Lee Eng Eow (as director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P–02–264 OF 1998
NH CHAN, ABDUL MALEK AHMAD AND AHMAD FAIRUZ JJCA
16 JUNE 1999

Civil Procedure *— Originating summons — No cause of action or substantive issue — Suit against director of company over distribution of deceased's property under a will — Cause of action not identified in originating summons — Whether application should be granted*

On 18 April 1972, Lee Guat Cheow, the deceased, made a will in which he left his residuary estate to his wife and his two sons. One of the sons Lee Eng Hai predeceased his father. The testator Lee Guat Cheow died on 5 September 1980. The executors of the will were the wife of the testator, Low Ai Lian, and his son Lee Eng Eow. Subsequently on 29 December 1996, Low Ai Lian died and that left Lee Eng Eow as the remaining executor. In late 1997, the executrix of the estate of Low Ai Lian and the administratrices of the estate of Lee Eng Hai brought the present action — praying for the division and transfer of the remaining estate of Lee Guat Cheow, and subsequently the transmission of the shares of Low Ai Lian and Lee Eng Hai, to the plaintiffs — by originating summons against Lee Eng Eow in his capacity as a director of a limited company known as Lee Guat Cheow & Co Sdn Bhd. No cause of action was identified in the originating summons. The judge granted the orders sought by the plaintiffs and hence the appeal.

Held, allowing the appeal with costs.

(1) An originating summons — like a pleading in a statement of claim — must contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief or remedy is claimed. Since the orders sought by the plaintiffs in the instant originating summons are not founded on any cause of action against the company, the originating summons should have been dismissed (see p 487F–I).

(2) Even if the plaintiffs have a cause of action against the company (which they have not), the plaintiffs have not sued the company. They have sued a director of the company who is the wrong party to be sued. A limited company has a separate legal personality of its own, and can only sue or be sued in its own name (see pp 485I–486A).

(3) The defendant Lee Eng Eow was not sued in his capacity as an executor of the estate of Lee Guat Cheow nor was he sued in his

personal capacity. If he was sued for breach of fiduciary duty or for breach of trust, then he should have been cited as defendant either in his own name or in his representative capacity as an executor of the estate of the deceased (see p 485G–I).

[Bahasa Malaysia summary

Pada 18 April 1972, Lee Guat Cheow, si mati membuat suatu wasiat di mana beliau meninggalkan baki harta pusaka kepada isteri dan dua anak lelakinya. Salah satu daripada anak lelakinya Lee Eng Hai meninggal terdahulu daripada bapanya. Pewasiat Lee Guat Cheow mati pada 5 September 1980. Wasi wasiat tersebut adalah isteri pewasiat Low Ai Lian dan anak lelakinya Lee Eng Eow. Kemudiannya, pada 29 Disember 1996 Low Ai Lian meninggal dan tinggal Lee Eng Eow sebagai wasi yang masih hidup. Pada akhir 1997, wasi harta pusaka Low Ai Lian dan pentadbir-pentadbir harta pusaka Lee Eng Hai membawa tindakan ini — memohon untuk pembahagian dan pemindahan baki harta pusaka Lee Guat Cheow, dan selanjutnya pemindahan-pemindahan saham-saham Low Ai Lian dan Lee Eng Hai kepada plaintiff-plaintiff — melalui saman pemula terhadap Lee Eng Eow di dalam kapasitinya sebagai pengarah sebuah syarikat berhad yang dikenali sebagai Lee Guat Cheow & Co Sdn Bhd. Tiada kausa tindakan telah dikenal pasti di dalam saman pemula. Hakim telah membenarkan perintah-perintah yang dipohon oleh plaintif-plaintif dan rayuan dibuat.

Diputuskan, rayuan dibenarkan dengan kos:

(1) Suatu saman pemula — seperti suatu pliding di dalam pernyataan tuntutan — mesti mengandungi suatu pernyataan yang tepat akan relif atau remedi yang dituntut dengan butir-butir mencukupi untuk mengenal pasti kausa tindakan berkenaan dengan relif atau remedi yang dituntut. Oleh sebab perintah-perintah yang dipohon oleh plaintif-plaintif di dalam saman pemula ini tidak berasaskan pada apa-apa kausa tindakan terhadap syarikat, saman pemula tersebut sepatutnya telah ditolak (lihat ms 487F–I).

(2) Jikalau pun plaintif-plaintif mempunyai kausa tindakan terhadap syarikat tersebut (yang mana mereka tiada mempunyai), plaintif-plaintif tidak mendakwa syarikat tersebut. Mereka telah mendakwa seorang pengarah syarikat tersebut yang merupakan pihak yang salah untuk didakwa. Sebuah syarikat berhad mempunyai personaliti tersendiri di sisi undang-undang. Ia hanya boleh mendakwa dan didakwa di atas namanya sendiri. (lihat ms 485I–486A)

(3) Defendan Lee Eng Eow tidak didakwa di dalam keupayaannya sebagai wasi harta pusaka Lee Guat Cheow dan tidak juga didakwa di dalam keupayaan peribadinya. Jika beliau didakwa untuk pelanggaran kewajipan fidusiari atau untuk pecah amanah, maka beliau sepatutnya telah disaman sebagai defendan sama ada

di dalam nama beliau sendiri atau di dalam keupayaan perwakilan sebagai wasi harta pusaka si mati (lihat ms 485G–I).]

Notes

For cases on originating summons generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3176–3215.

Cases referred to

Aron Salomon(Pauper) v A Salomon & Co Ltd [1897] AC 22 (refd)
Lee v Lee's Air Farming Ltd [1961] AC 12 (refd)
Letang v Cooper [1965] 1 QB 232 (refd)
Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd [1997] 1 MLJ 409 (refd)
Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram [1998] 1 MLJ 89 (refd)

Legislation referred to

Companies Act 1965 s 16(5)
Wills Act 1959 s 25
Rules of the High Court 1980 O 6 rr 2(1)(a), 3(1), O 7 r 3(1)

V Sivagurupatham (*Sivaguru & Co*) for the appellant.
Gerard Chan Weng Yew (*Lim Kean Siew & Co*) for the respondents.

NH Chan JCA (delivering judgment of the court): We heard this appeal on 25 January 1999 and gave our decision the same day. We allowed the appeal. We give our reasons below.

On 18 April 1972, Lee Guat Cheow (since deceased) made a will in which he left his residuary estate to his wife and to his two sons. Clause 6 of the will states:

> I hereby devise and bequeath all my remaining estate both real and personal whatsoever and wheresoever absolutely to my said wife Low Ai Lean and my sons Lee Eng Eow and Lee Eng Hai in equal shares.

One of the sons, Lee Eng Hai, predeceased his father. He died on 6 July 1977. It appears that at the time of his death, he left issue. The testator Lee Guat Cheow died on 5 September 1980. The effect, it seems, is that at the time of the testator's death, his residuary estate devolved on his wife, his son Lee Eng Eow and the issue of the late Lee Eng Hai who have survived the testator (s 25, Wills Act 1959).

The executors of the will of the late Lee Guat Cheow (when the will was probated) were the wife of the testator Mrs Lee Ai Lian, nee Low and his son Lee Eng Eow. Subsequently, on 29 December 1996, Low Ai Lian died and that left Lee Eng Eow as the remaining executor.

In late 1997, the executrix of the estate of Low Ai Lian (deceased) and the administratrices of the estate of Lee Eng Hai (deceased) brought the

present action by originating summons against Lee Eng Eow in his capacity as a director of a limited company known as Lee Guat Cheow & Co Sdn Bhd. (Any Latin agent-noun ending in –tor could form a feminine in –trix and the Latin plural for that is –ices. So that, the plural for administratrix is administratrices. But, when it comes to usage, lawyers have used their own spelling. In a letter to *The Times*, the Senior Registrar of Probate wrote: 'It has long been the practice,' he said 'of the devotees of the somewhat esoteric cult of probate freely to employ the word executrixes ...': see *Fowler's Modern English Usage* (2nd Ed revised by Sir Ernest Gowers) at pp 649, 650. In the same vein, judges have always spelt the word judgement as judgment in their written decisions). We are appalled at the laxity of the person responsible for the shoddy drafting of the originating summons. We reproduce it below so that when we comment on it in our judgment, the defects can be seen at once.

In the High Court of Malaya at Penang
Originating Summons No 24–985–97

Between

1 Mary Lee as Executrix of the Estate of Low Ai Lian, deceased

2 Teh Lay Nah and Lee Soo Ming as administratrices of the Estate of Lee Eng Hai, deceased ... Plaintiffs

AND

Lee Eng Eow as Director of Lee Guat Cheow & Co Sdn Bhd (Under Receivership) ... Defendant

ORIGINATING SUMMONS

LET ALL PARTIES CONCERNED attend before the judge on 26 February 1998 at 9.00 am to hear an application of the plaintiffs for a declaration and the following orders:

(1) A declaration that that according to the construction and interpretation of cl 6 of the will of Lee Guat Cheow dated 18 April 1972, that all the remaining estate both real and personal whatsoever and wheresoever of the Estate of Lee Guat Cheow, deceased be divided in the following manner:

   (a) $^1/_3$ to the first plaintiff as executor of the Estate of Low Ai Lian, deceased.

   (b) $^1/_3$ to the second plaintiff as administratrices of the Estate of Lee Eng Hai, deceased.

   (c) $^1/_3$ to Lee Eng Eow.

(2) An order that the defendant do instruct the directors and/or secretaries, of Lee Guat Cheow & Co Sdn Bhd to transfer the shares and rectify the register of the said company's shareholders in the following manner:

A (a) 780 shares in the said company held by Low Ai Lian, deceased in her personal capacity to be transmitted to Mary Lee.

(b) $^1/_3$ of 1,300 shares to be transmitted from the Estate of Lee Guat Cheow, deceased to the Estate of Low Ai Lian, deceased and subsequently from the Estate of Low Ai Lian, deceased to the first plaintiff.

B (c) $^1/_3$ of 1,300 shares to be transmitted from the Estate of Lee Guat Cheow, deceased to the Estate of Lee Eng Hai, deceased and subsequently from the Estate of Lee Eng Hai, deceased to the second plaintiffs.

(3) That pending the above rectification of register, Lee Eng Eow is C restrained from voting on the 1,300 shares of Lee Guat Cheow & Co Sdn Bhd as sole surviving executor.

(4) That the first plaintiff be eligible to be elected as a director and that she has voting rights in pursuant to the 780 and $^1/_3$ of 1,300 shares in the (sic) Lee Guat Cheow & Co Sdn Bhd.

D (5) Costs of this application to the plaintiffs.

This is a most strange document. The plaintiffs never bothered to identify their cause or causes of action against the defendant. If the plaintiffs had intended to sue the company Lee Guat Cheow & Co Sdn Bhd, then they have sued the wrong party. And yet, here we have an action brought against E an individual director of a company and not the company. And, if they had intended to sue Lee Eng Eow for breach of fiduciary duty or for breach of trust or even as executor in a construction summons for an interpretation of the will, then these plaintiffs should have sued Lee Eng Eow either in his personal capacity or as executor of the estate of Lee Guat Cheow, deceased. But, here, we have an action brought against a director of a limited F company. We are unable to apprehend from this originating summons what cause of action these plaintiffs could possibly have against this limited company or any of its directors.

Order 6 r 3(1) of the Rules of the High Court 1980 ('the RHC') reads:

(1) Before a writ is issued it must be endorsed —

G (a) where the plaintiff sues in a representative capacity, with a statement of the capacity in which he sues;

(b) *where a defendant is sued in a representative capacity, with a statement of the capacity in which he is sued.* (Emphasis added.)

Here, in the present case, the defendant Lee Eng Eow was not sued in his H capacity as an executor of the estate of Lee Guat Cheow, deceased nor was he sued in his personal capacity. If he was sued for breach of fiduciary duty or for breach of trust, then he should have been cited as defendant either in his own name or in his representative capacity as an executor of the estate of the deceased. But, here, the defendant was sued as a director of Lee Guat I Cheow & Co Sdn Bhd.

One of the first things a law student learns is that a limited company has a separate legal personality of its own. It can only sue or be sued in its own

name. And here we have a case of a company being sued, not in the name of the company, but in the name of one of its directors by people who are not even members of the company. If the plaintiffs were members of the company (but they were not in the instant case) and they felt that a wrong had been done to the company, then, perhaps (in such a situation) they might be able to bring a derivative action against the directors of the company and also to add the company as a nominal defendant so that it might be bound by the result. We frown upon the conduct of the counsel who had appeared for the respondents (plaintiffs) in the court below for insisting on pursuing with his clients' action (which was misconceived ab initio) and for still supporting it even when it was before us in the Court of Appeal as if the law does not matter.

Section 16(5) of the Companies Act 1965 provides as follows:

> On and from the date of incorporation specified in the certificate of incorporation but subject to this Act the subscribers to the memorandum together with such other persons as may from time to time become members of the company shall be a body corporate by the name contained in the memorandum capable forthwith of exercising all the functions of an incorporated company and of suing and being sued and having perpetual succession and a common seal with power to hold land but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided by this Act.

What that passage means is this, and we quote from Walter Woon, *Company Law* (1988), at p 25:

(a) the company is a body corporate with the powers of an incorporated company;

(b) *it may sue and be sued in its own name;*

(c) it has perpetual succession;

(d) it may own land; and

(e) the liability of the members may be limited.

(Emphasis added.)

In addition to the statutory effects of incorporation, there is also a fundamental difference between an incorporated and an unincorporated association, in that an incorporated association has a legal personality of its own apart from the persons who comprise it. The separate legal personality of a company is not specifically provided for in the Companies Act. Nevertheless, the whole scheme of the Act is predicated upon the company's separate existence: see Walter Woon at p 25; and the well known cases of *Aron Salomon(Pauper) v A Salomon & Co Ltd* [1897] AC 22 (HL) and *Lee v Lee's Air Farming Ltd* [1961] AC 12 (PC). This is elementary law. Yet, we have here a practising lawyer who is unaware of what is trite who has the audacity to appear before us in the Court of Appeal. Now, we can appreciate why there is a move to restrict lawyers with inadequate knowledge of the law and insufficient experience from appearing in the superior courts.

A If a director breaches his duty to the company, it is the company who has the right to sue him. A member cannot sue the director on the company's behalf. If a contracting party breaches his contract with the company, it is the company who has the right to sue the contractor. A member of the company cannot sue on the company's behalf to enforce a company's rights. This rule is known as the 'proper plaintiff rule' or the 'rule B in *Foss v Harbottle*': see Walter Woon at p 225. Again, this is elementary law. But we have here, in the present case, these plaintiffs (who are not members of the company) who are legally represented suing a director of a company when even a member cannot sue him on the company's behalf.

Do the pleadings in the present case disclose any reasonable cause of C action against the appellant (defendant) as a director of Lee Guat Cheow & Co Sdn Bhd? Order 5 r 1 of the RHC states that: 'civil proceedings in the High Court may be begun by writ, originating summons, originating motion or petition'.

Order 6 r 2(1)(a) states:

D (1) Before a writ is issued it must be indorsed —

(a) with a statement of claim or, if the statement is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby; ... .

And O 7 r 3(1) states:

E (1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

F 'So that an originating summons is just like a pleading in a statement of claim, it must contain a concise statement of the relief or remedy claimed with sufficient particulars to identify the cause of action in respect of which the relief or remedy is claimed. In other words, an originating summons, like a statement of claim, must disclose a cause of action (*Platinum Heights* G *Sdn Bhd v Sun Mix Concrete Sdn Bhd* [1997] 1 MLJ 409). Therefore, if the summons itself, as in the instant case, does not disclose any cause of action, it can be dismissed': see *Saraswathy Devi a/p Nadchatiram v Vijayalakshmi Devi a/p Nadchatiram* [1998] 1 MLJ 89 at p 96 which is a decision of this court. The words 'cause of action' have been defined by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232 at pp 242–243 as meaning 'simply a H factual situation the existence of which entitles one person to obtain from the court a remedy against another person'.

Since the orders sought by the plaintiffs in the instant originating summons are not founded on any cause of action against the company, the originating summons should have been dismissed. The originating I summons itself does not disclose any reasonable cause of action against the company. In any case, even if they have a cause of action against the company (which they have not), the respondents have not sued the

company. They have sued a director of the company who is the wrong party to be sued. The judge below was wrong to have granted the orders sought by the respondents (plaintiffs). We have allowed the appeal with costs here and in the court below with the result that the originating summons is dismissed.

Appeal allowed with costs.

Reported by Benjamin Yong